

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PAMELA G. CAPPETTA,

Plaintiff;

v.

Civil Action

3:08CV288

GC SERVICES LIMITED PARTNERSHIP,

Defendant.

May 12, 2009
Richmond, Virginia
10:35 a.m.

BEFORE: HONORABLE JAMES R. SPENCER
Chief United States District Judge

APPEARANCES: LEONARD A. BENNETT, ESQ.
MATTHEW J. ERAUSQUIN, ESQ.
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Counsel for Plaintiff;

JAMES C. SKILLING, ESQ.
DAVID M. SCHULTZ, ESQ.
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JEFFREY B. KULL
OFFICIAL COURT REPORTER

P-R-O-C-E-E-D-I-N-G-S

THE CLERK: If I could ask the attorneys to identify themselves for me, please?

MR. BENNETT: Matthew Erausquin and Len Bennett of Consumer Litigation Associates.

MR. SKILLING: Jim Skilling on behalf of GC Services. And I'm here today with Mr. David Schultz from the Hinshaw firm in Chicago and my associate, Zev Antell.

THE COURT: All right.

THE CLERK: Case Number 3:08CV288: Pamela G. Cappetta versus GC Services Limited Partnership. The plaintiff is represented by Leonard Bennett and Matthew Erausquin. The defendant is represented by David Schultz, Jim Skilling, and Zev Antell. Are counsel ready to proceed?

MR. BENNETT: Plaintiff is, Your Honor.

MR. SKILLING: Defendant is, Your Honor.

THE COURT: All right. Mr. Bennett?

MR. BENNETT: Thank you, Judge. If it please the Court, I'm embarrassed to appear before our Chief Judge on a discovery dispute, and I expect that, I'm hopeful that the fact that this is my first appearance before Your Honor on a discovery dispute, and that it is unusual for us to have discovery disputes, will comport with my representation that we have done our best in this

1 case to reduce those numbers of disputes.

2 If you imagine, in a perfect case, a greedy
3 plaintiff's counsel, and I have been a greedy plaintiff's
4 counsel at times in other cases, may want 100 percent. We
5 recognize, if for no other reason the tremendous
6 difficulty imposing on a Magistrate Judge's time, that we
7 have already simplified the vast majority of our disputes.
8 You have two previous orders from Judge Lauck that
9 were -- in my interpretation, they were critical of the
10 defendant's discovery position. And we have now reduced
11 the dispute, and I can simplify it further, Your Honor, to
12 a single question. In this case, we began, we filed it,
13 my office, not Mr. Erasquin's, filed a poorly-drafted
14 complaint. Your Honor properly granted a 12(b)(6) with
15 leave to amend. It was corrected and proceeded in August
16 of last year. This is probably the longest case I have on
17 the docket actively being litigated in our state.

18 The discovery was served in August of 2008. And
19 over a series of months, I think at one point Judge Lauck
20 in her 12/24/08 order details the chronology of these
21 disputes very cleanly. There were gaps of some 90 days
22 where we were wrestling to try to get the defendant to
23 comport, comply with discovery.

24 The ultimate question that we sought was
25 evidence as to whether the allegation in this case was a

1 systemic problem. We had no evidence prior to a
2 deposition of American Express, third-party discovery that
3 we were successful at completing, as to whether or not
4 this was an odd, isolated incident. And we certainly
5 didn't have any basis under Rule 11 to allege otherwise.
6 The allegation, to simplify the case, the most disputed of
7 the claims, the Fair Credit Reporting Act can be
8 explained, I think, as this. American Express is
9 different than most credit cards. I learned it new in
10 this case. A Chase or Capital One credit card, for
11 example, that a consumer may open with their spouse,
12 typically the spouse and the other -- both parties can be
13 co-obligors. And in conventional contract principles, an
14 obligor is the same as a co-obligor. American Express has
15 a different system entirely, news to me. They never have
16 a co-obligor. There is only in any of its products a
17 single obligor that is referred to as the cardholder.

18 The spouse or the other person that then is
19 provided a convenience card to use is referred to as a
20 supplemental or a supplemental cardholder. That
21 supplemental, according to American Express, could be
22 liable for charges made by the supplemental and for
23 nothing more. And the American Express documents referred
24 to it as a quasi-contract concept. That is, the
25 supplemental doesn't ever receive a contract that says,

1 "Here is what you have to do." But there would be an
2 argument, maybe an equitable or quasi-contract or open
3 account argument otherwise.

4 We now know that GC Services, one of the largest
5 debt collectors for American Express, and American Express
6 is an innocent in this case here, but the GC Services,
7 Your Honor, collects for supplementals but never receives
8 information from American Express as to whether a
9 supplemental owes any money. And in fact, as recently as
10 Thursday, GC Services's manager of the facility that
11 handles the American Express accounts testified that GC
12 Services never has authority to attempt to collect from
13 supplementals. So the question of the quasi-contract, the
14 American Express argument is a red herring, but to provide
15 the background to Your Honor. So you have a body of
16 supplemental cardholders. They are identified in the
17 American Express electronic conveyance of information to
18 the defendant to start its collection.

19 American Express -- GC Services, rather, follows
20 a number of tools to obtain, to apply pressure on the
21 obligor on the account, the primary or the cardholder as
22 they refer to. Significant efforts are spent on location
23 information and gathering personal information.
24 Therefore, account records that says look at their
25 spending habits and if they have a gym they regularly pay

1 to each month, call the gym and leave messages. If they
2 have a pharmacy they regularly use, call and leave
3 messages at the pharmacy. One of the tools we are
4 alleging in the complaint is that they also apply
5 pressures on the supplementals. And in this instance, we
6 know that our client, and we have discovered several other
7 consumers' supplementals were subject to a consumer report
8 in which GC Services purchased through Micro Bilt and
9 Experian a product that Experian has already testified in
10 this case is a consumer report. Inquiries included in the
11 consumer's file, employment information, lots of other
12 information. That's a legal argument for a later point, I
13 expect.

14 But to simplify it, as I said I would do, the
15 single real issue that remains in dispute between the
16 parties, in fact, the same exact issue in the LUCAS case
17 cited in our materials in which Mr. Schultz and GC
18 Services had a similar position and multiple sanctions
19 orders in another class case, is establishing the class
20 membership, the numerosity element. We believe we have
21 everything else. But the numerosity element, we are right
22 now still at circumstantial evidence. And so we have gone
23 about various ways to try to obtain that information.

24 The first item addressed in the third
25 stipulation is the easiest and simplest of those. It is

1 an interrogatory in which we ask for the identity of these
2 individuals, to tell us who they are. There is a
3 protective order in place. We are pleased for whatever
4 restrictions the defendant would want to have imposed on
5 that information and its use. But we have asked for it.

6 Earlier in this Cappetta case, Your Honor, Judge
7 Lauck issued a ruling that detailed at length something
8 Your Honor has long ago known, certainly Judge Dohnal
9 recently ruled as well in another case in this fashion,
10 that in order to show a burden as an objection to an
11 interrogatory, you have to show a burden. In this
12 instance, there is no declaration. There is not even an
13 explanation or hypothesis about why it would be difficult.

14 Nevertheless, we are plaintiffs; we have to
15 prove a case. We hired an expert that our firm has
16 advanced considerable money to, close to \$15,000 in travel
17 and in expert witness fees, who specializes in their
18 computer program. After considerable wrestling back and
19 forth, and attempted mediation of this issue by Judge
20 Dohnal, our expert was permitted a limited access to the
21 use of their facility, has been there, has come back, and
22 would testify that it is a simple procedure for the
23 defendant to identify the putative class members.

24 We also, independent of that, Judge, have asked
25 for a list of supplemental cardholders. And we have

1 arranged, if the supplemental cardholders are provided,
2 another mechanism by which the plaintiffs can absorb the
3 burden to identify which of those supplementals were
4 subject to the consumer report pool. Mr. Clark, who is a
5 fantastic attorney in my opinion, it is on the record, I
6 don't want to compliment my opponent too much, but
7 Mr. Clark, who represents Experian for Jones Day, the
8 primary point person for them in this region, accepted a
9 subpoena to Experian for a list of individuals on whom
10 this product, this consumer report, was provided to GC
11 Services. That's broad. Mr. Clark and myself have
12 negotiated to narrow that so that Experian, once it
13 receives the list of supplementals that we have to get
14 from the defendant, Experian will then match that with its
15 own account records and identify which of those
16 individuals the defendant pulled a report on.

17 We also have done the same thing with Micro
18 Bilt. Micro Bilt, Your Honor, is the reseller. It is the
19 middleman through which the defendant has purchased these
20 Experian reports. It licenses, GC Services, licenses each
21 terminal that can access a Micro Bilt product. And Micro
22 Bilt has reached that similar agreement. That is, when we
23 provide it the list of supplementals, Micro Bilt has
24 agreed and as a narrowing of its subpoena to match its
25 account records to identify which of those supplemental

1 lists were subject to a consumer report. That's a
2 long-winded way of saying the simple issue, Judge, and
3 Your Honor, all discovery disputes are over, frankly, or
4 resolved but for the outstanding sanctions issues which
5 Judge Lauck had essentially taken in abeyance, are over if
6 the defendant is ordered to produce a list of the
7 supplemental cardholders, the individuals that did not
8 have any obligation to American Express. We would then be
9 able to match that with Experian's records or with Micro
10 Bilt's records. That's the simplest issue with respect to
11 discovery.

12 I'm happy -- happy isn't an accurate word, but I
13 am certainly willing at Your Honor's request to detail any
14 and all other components to this. But I really don't want
15 to take more of Your Honor's time than I have to.

16 THE COURT: Thank you very much.

17 MR. SKILLING: Good morning, Your Honor. Jim
18 Skilling on behalf of the defendant. Judge, the discovery
19 dispute does go back quite a ways. The interrogatories
20 and requests for productions were served after there was
21 much discovery that went on in the case, which included
22 the hearings before Judge Lauck and eventually referral to
23 Judge Dohnal. The defendant, GC Services, does collect on
24 behalf of American Express approximately 7,000 to 10,000
25 accounts per month. Your Honor, its database is called a

1 Star System that runs a pick software system which is
2 approximately 25 years old. It does not work like modern
3 technology such as Microsoft or a Word document. So there
4 has been a lot of discussion about how to get the data
5 from the system.

6 The plaintiffs have chosen never to serve a
7 30(b)(6) deposition notice on the defendants for these
8 technological issues. They did take an individual
9 deposition of Ms. Leanna Walberg, who is the head of the
10 information technology department, and learned about the
11 system. Subsequent to that, they did hire Mr. Bacall, and
12 Your Honor, the defendant was under the understanding that
13 this was the protocol that we were going to basically
14 engage in in order to determine if it was possible to mine
15 the data from GC Services's database. And Your Honor,
16 this is between 250,000 and 500,000 accounts, probably 20
17 to 25 million, actually, pages of data. Because each
18 account has between 10 and 20 pages of account notes and
19 other information on each debtor.

20 What GC Services cannot do is just push a button
21 to pull out the accounts that have supplemental debtors on
22 the accounts. And the core issue is whether or not, our
23 understanding was, under Judge Dohnal's order, when he
24 ordered the site inspection, which Your Honor, I did
25 detail in our response to the motion for extension,

1 defendant's compliance with that March 11th order, the
2 site inspection did occur. Mr. Bacall was given the data.
3 And we have heard no other response until today that some
4 program could be written to mine that particular data.

5 So GC Services's position is it has hundreds of
6 thousands of accounts of data from American Express. The
7 core issue is culling out the supplemental accounts, and
8 also, with regard to the class definition, which Your
9 Honor, our understanding was we were responding to
10 discovery concerning the viability of a class, not
11 engaging in class discovery, that is, being required to
12 provide, you know, vast amounts of data for the plaintiffs
13 to go through. We offered to give them a sampling of 100
14 or a thousand accounts for them to review to determine if
15 they could write a program in order to cull out the
16 supplemental accounts on which, Your Honor, there is a
17 second and third step, on which GC Services issued this
18 Micro Bilt request for the address update.

19 So the defendant's position is, while looking
20 into the issue of viability, that each account would have
21 to be an individual inquiry would have to be made to go
22 into each account in order to determine three things.
23 One, whether it was an Optima account; two, whether there
24 is a supplemental cardholder; three, whether a Micro Bilt
25 or Experian report was pulled on that. And four, whether

1 or not that supplemental cardholder used or was obligated
2 on the account. Because if the supplemental cardholder is
3 obligated on the account, they are not a class member if
4 this class were ever to go forward because GC Services
5 would have had a permissible purpose to contact the
6 supplemental cardholder.

7 And Your Honor, one other nuance is, it is not
8 illegal or improper for GC Services to contact a
9 supplemental cardholder. Under the Cardholder Agreement,
10 it says that American Express can contact the supplemental
11 cardholder about the account, which is what occurred here.

12 Finally, Your Honor, we have produced thousands
13 of pages of documents. And of course there's other
14 motions pending about the hard drive, but the final point
15 is, Your Honor, we've gotten to the point where we thought
16 we were doing a protocol through Judge Dohnal. We
17 complied with that. They then served discovery and said,
18 "Well, you have to push a button or answer this
19 interrogatory that identifies these particular
20 individuals," which we have already established that we
21 can't push a button and just present that to the plaintiff
22 or the Court. And therefore, we were trying to determine
23 a protocol, how that data could be mined, and/or if the
24 plaintiff wanted to take further depositions regarding the
25 IT issues in the case, which to date they have not done.

1 So Your Honor, we are willing and able to
2 provide a sampling of the data to be presented to the
3 plaintiffs. We will certainly respond, Your Honor, to any
4 protocol that Mr. Bacall puts together to review that to
5 determine whether that protocol or that, you know, program
6 could be run on the Star System.

7 Judge, the request for production says, "Please
8 give us those 500,000 accounts in Word format" so that
9 they can then search the word "supplemental" or "Micro
10 Bilt" or "Experian." And it has been established through
11 testimony that basically, you can do it on one account.
12 You can convert the notes that are in this Star System
13 into a Word format. But it is very burdensome if not
14 impossible to produce all of that data into a Word format
15 that would be searchable, Your Honor.

16 And again, Your Honor, the issue with Micro Bilt
17 and the issue with Experian is, I'm not sure, Your Honor,
18 and depositions have not been conducted of Micro Bilt,
19 whether they can produce that information in a searchable
20 format. What I do know is that Micro Bilt cannot identify
21 who we collected against that had a supplemental account.
22 That can only be done on an individual basis by actually
23 looking at the particular account that GC Services has
24 been collecting upon.

25 So Your Honor, we have taken a protocol

1 approach. We have offered a sampling. They have had
2 their expert, have access to our database, our
3 architecture, the computer architecture. I talked to
4 Leanna Walberg. She was with Mr. Bacall. I talked to her
5 yesterday and I said, "Was there anything the plaintiff's
6 expert needed or required further for their analysis of
7 our computer systems or our architecture or how this
8 system works?" And she informed me that she had not
9 received any further call from Mr. Bacall or that he had
10 not required any further information.

11 So Your Honor, the defendant's position is that
12 it has complied with, certainly with Judge Dohnal's order
13 and the prior orders of the Court regarding this issue.
14 And certainly, Your Honor, we think that the class
15 discovery is premature because the amendment, of course,
16 has just been filed. But we did engage in the issue of
17 viability, and this is the status of where we are in this
18 discovery.

19 And Your Honor, we certainly, there has, you
20 know, been sort of an undercurrent that the defendants
21 just obstructed discovery completely, Your Honor. And I
22 just hope the record will reflect certainly, Your Honor,
23 that we have taken all means to comply with Judge Lauck's
24 orders and Judge Dohnal's order in providing any access
25 the plaintiff requires to our technology to determine this

1 issue.

2 Judge, they said they didn't trust us to run a
3 sample. They said, "We don't want your sample. We don't
4 trust that you will give us the correct data. We want our
5 own expert to review your system." And that's what Judge
6 Dohnal ordered, and that's what we did. And now they are
7 here saying, "You have to answer these interrogatories"
8 when we have already established we cannot push a button
9 and give them that list. And it was our understanding
10 that that is why Judge Dohnal issued his order and we
11 undertook all of those efforts. So that, Your Honor, on
12 that particular issue, is our position at this time.

13 THE COURT: All right. Thank you. I'll let you
14 respond.

15 MR. BENNETT: Yes, Your Honor. Judge, just an
16 overview. Judge Dohnal's order: We had a settlement
17 conference. Judge Dohnal tried to resolve this issue.
18 And we both worked through Judge Dohnal and agreed to the
19 site inspection protocol, and then even couldn't get our
20 expert there for a while through that, but the last line
21 of the order, if the Court reads it, Judge Dohnal kicks
22 everything back, just says, "I'm only resolving this site
23 inspection issue. All the other discovery issues are
24 Judge Lauck's."

25 You have two orders, a memorandum opinion

1 already from Judge Lauck, that give you what I think to be
2 an objective flavor of the previous history of the case.
3 Anyone, any plaintiff that appears before Your Honor, no
4 matter how clean my hands are, could have done better.
5 But you don't see that in the memorandum opinions in this
6 case, and I think correctly so.

7 The sample that has been offered to date was
8 100. I think you even see it, to the extent the Court
9 regrettably had to wade through the stipulations, but you
10 see there was an offer. If a sample, and we have always
11 said this, if for example there were a 10,000 person
12 account sample, and the sample was programmed by the
13 third-party expert witness as opposed to their folks, then
14 we could agree.

15 But I would ask the Court the simplest way to
16 rule is consistent with what Judge Lauck did, a Magistrate
17 Judge, of course, but what she did earlier in the case on
18 the 24th of December, in which claims of burdensomeness
19 were rejected by the Court because there was no evidence
20 offered of what that burden was to any extent or degree.
21 In fact, the only evidence you have about burden is a
22 declaration that our expert provided attached to the
23 stipulation in which that expert says, under oath, and
24 this is an individual we did not know before the case,
25 just a computer guy, that it would not be difficult, it

1 would not be a burden.

2 In this instance, Judge, we have done all we can
3 to remain consistent with our obligations as Eastern
4 District of Virginia attorneys, and certainly Mr. Skilling
5 has litigated honorably in the case, but this particular
6 defendant and its lead counsel had the exact same set of
7 arguments that caused exactly the same burden on the
8 Indiana Court in the LUCAS case, ultimately with GC
9 Services still refusing to provide the numerosity evidence
10 and the class list. And the Court, and I don't know how
11 viable this is, I haven't researched it, actually granting
12 default on the elements of Rule 23. An issue I don't
13 think the Court could do because you need to protect due
14 process of other individuals. But Judge, I don't want to
15 work the case to death. We would like to get it
16 completed.

17 THE COURT: All right. Well, let me explain to
18 you what I am going to do. I will draft an order
19 resolving this, and I will be as clear as I can possibly
20 be. Because, you know, the next step is sanctions. And I
21 want everybody to understand what I'm saying and what the
22 obligations of the parties are after this order that I
23 will issue. I'm sorry that things have gotten to this
24 point. This is pretty much the judicial equivalent of
25 having too many cooks in the kitchen. I guarantee you, if

1 I had had this case from the beginning we would be way
2 beyond this crap. This case has been around way too long,
3 and we are going to work it and get it done. And as I
4 say, clarity is, I think, what we need here, and that's
5 what I am going to provide in resolving these discovery
6 issues.

7 We were scheduled to pre-try this case today to
8 try to get at some reasonable and rational date for the
9 completion of this matter. And I do want to put down a
10 date. I want to get the train on the track toward a
11 destination so that we can at least be working in that
12 direction full bore. This is May. And Mr. Bennett, I
13 think you mentioned where you thought you were. You are
14 trying to get information on numerosity so that we can
15 have some resolution of this class request business; is
16 that correct?

17 MR. BENNETT: Absolutely, Judge.

18 THE COURT: And if the discovery issues will be
19 resolved swiftly, how long do you think it would take you
20 to get to where you can use the information so that it can
21 be available and ready for all of us so we can resolve
22 this issue?

23 MR. BENNETT: Yes, Your Honor. My estimation is
24 60 days. The only caveat, and candidly, Judge, I believe
25 that our work is pretty much completed or the completion

1 of it is scheduled. But I need to be able to continue to
2 coordinate with Experian and with Micro Bilt to match the
3 list to come up with that information. Candidly, Your
4 Honor, Your Honor is familiar with the numerosity law in
5 our circuit. We have offered a stipulation. These
6 hundreds of thousands of accounts, we have said we will
7 stipulate it is 100. Because at that point we can then
8 raise the issues for Your Honor. If Your Honor finds for
9 various reasons that, for any reason, that it is not a
10 viable class action, then there is no need for anybody to
11 spend the money.

12 I would offer that again, the same stipulations
13 that were offered in the LUCAS case, if the defendant will
14 stipulate that the class is at least a hundred. Failing
15 that, Your Honor, we need to match the list. And my
16 expectation is it would take about 60 days from when the
17 defendant gets it to us for the third parties. If Your
18 Honor built in two weeks of briefing for us, then we would
19 be fine.

20 THE COURT: All right. Mr. Skilling, do you
21 have any thoughts?

22 MR. SKILLING: I have no objection to 60 days.

23 MR. BENNETT: If the Court please, given my
24 lengthy experience, which is not at all in your position,
25 but if Your Honor sets a trial date, we all respect it as

1 a targeted trial date, but I would ask that the Court also
2 would consider building in an order of a status update
3 from the parties, that we could provide informally -- not
4 informally, but without taking the Court's hearing time,
5 we would collectively file a status update to Your Honor
6 maybe after 30 days from now so that Your Honor would have
7 some idea of where the train is.

8 THE COURT: All right.

9 MR. SKILLING: I just had one thing. Our
10 opposition to the motion to amend is due, I believe,
11 Friday. I didn't know how -- obviously, for the record,
12 it is an individual case. And of course we have preserved
13 our objections regarding class discovery. But how that
14 may or may not affect the scheduling in the matter if it
15 is filed and then ultimately a motion for cert is filed,
16 how that may affect the calendar.

17 THE COURT: All right. Your response is due on
18 Friday? All right. Let me suggest this: Today is May
19 12th. I'm going to make an effort to get this order out
20 to you all by Friday of this week. And then what I would
21 like is a status report from you, Mr. Bennett, by close of
22 business on the 15th of June, how things are going.
23 That's about 30 days or so. And then another report, July
24 17th. That's about 60 days or so out. At that point,
25 once I get the status report, I would issue an order

1 providing a briefing schedule on the class issue. And I
2 would like to resolve that class issue before August 15th.
3 So we will give you ten days or whatever to brief this
4 issue, and then somewhere in early August or somewhere in
5 there, we will have, if necessary, a hearing on this
6 issue. Because once we get that done, out of the way, if
7 it is in, that may impact what goes on down the road
8 obviously in terms of the trial date that I intend to set
9 now, or it will just be out of the way and we will have a
10 case and we will deal with it.

11 So now in terms of the trial date, I would
12 suggest putting it off a little bit here, but I think
13 that's necessary. What about November 19th? That's a
14 Thursday.

15 MR. BENNETT: Point of personal privilege,
16 Judge. I don't forget one date, my wife's birthday, that
17 begins 11/19. If it could be a week earlier or a day
18 later or a week later, I would be appreciative. If the
19 19th is the only date available, we will be just fine.

20 THE COURT: We can probably work with you. What
21 about November 17th?

22 MR. BENNETT: Much better for the plaintiff,
23 Judge.

24 THE COURT: Mr. Skilling, is that all right?

25 MR. SKILLING: November 17th?

1 THE COURT: November 17th.

2 MR. SKILLING: That's fine, Your Honor.

3 THE COURT: We will put it down for a 10 o'clock
4 start.

5 MR. BENNETT: And Judge, of course, the Court
6 knows there is an additional built-in incentive besides
7 your own docket management to have that trial expedited.

8 THE COURT: All right. And if this case is just
9 the one case, how long do you think it would take to try
10 that?

11 MR. BENNETT: One day.

12 MR. SKILLING: One day.

13 THE COURT: All right. I think that's all that
14 we can accomplish today. But as I said, the one thing I
15 want you to all understand: My colleagues look through
16 our cases and see a case of this vintage on my docket, and
17 the question is, "What the hell is wrong with Spencer?"
18 And believe me, this case is going to disappear from my
19 life as quickly as I can make it disappear. So just be
20 ready to work. All right, thank you all very much. I
21 appreciate it.

22 MR. SKILLING: One clarification, Judge. Would
23 there be any opportunity for comment on the status report
24 by the defendant?

25 THE COURT: Sure. I'll get the status -- you

1 serve your status report on them and then you all can have
2 a few days to respond to it.

3 MR. SKILLING: Yes, Your Honor. Then the
4 briefing schedule on the class issue, I'm sort of unclear.
5 Would that be on the numerosity or on the amendment or it
6 would be a class certification standard?

7 THE COURT: No, this would be on the full class
8 certification. But as I understand it, numerosity is the
9 big issue. I'm sure there might be others, but we
10 would --

11 MR. SCHULTZ: Actually, numerosity is one
12 component but there's going to be a lot of issues and we
13 have talked about those in our briefs and Mr. Skilling hit
14 on them as well. Our biggest issue is not just are there
15 people who are subs on an AMEX account in which GC through
16 Micro Bilt accessed a report, whether or not it is a
17 consumer issue. That's another issue, whether we even
18 have a consumer report here. But regardless of that, the
19 bigger thing, I think, is there is going to be a lot of
20 individual inquiries which we are talking about, these are
21 supps, if these supps used the card they are obligated on
22 it so even if it is a consumer report, they therefore had
23 a permissible purpose to pull it. So that's a significant
24 issue.

25 THE COURT: I understand. But what I am hearing

1 from you is, the question is whether or not a particular
2 person who had, was a supplemental was a supplemental who
3 had an obligation or a supplemental who did not have an
4 obligation.

5 MR. SCHULTZ: That is the issue. How are you
6 going to figure that out? Primaries often say, "My spouse
7 used the card." Therefore they are obligated as well, the
8 supps, under the law. That's why Judge Lauck entered the
9 order saying let's look into viability. It wasn't just an
10 issue of numerosity. It was viability on those types of
11 issues and that's why we proposed a sample to demonstrate
12 there's going to be lots of these types of issues in
13 connection with the class.

14 MR. BENNETT: We disagree, Judge. In fact, the
15 issue is that the discovery that we have sought on the
16 question of numerosity is this issue. We know that, we
17 don't know of any supplementals on whom GC Services
18 accessed one of these reports in which it had any
19 information in its files whatsoever that that supplemental
20 was obligated, and certainly GC Services has already
21 testified it would not have pulled any of these reports
22 for the purpose of enforcing an obligation. But these are
23 legal issues that I'm sure the defendant, as in any class
24 case, will come up with as many arguments as they can.

25 THE COURT: The point is, whatever your

1 arguments are going to be, whatever they are, they are
2 going to be made within that briefing period.

3 MR. SCHULTZ: Some of these are going to be
4 addressed in our response to the motion for leave to file
5 an amended complaint that raises the class claim for the
6 first time. That's going to be in our response that will
7 be filed this week.

8 THE COURT: I'll take a look at it.

9 MR. SKILLING: Judge, just generally, I assume
10 that discovery is extended for 60 days, the implication of
11 the Court's ruling?

12 THE COURT: That's right.

13 MR. SKILLING: I guess for these issues and for
14 these purposes.

15 THE COURT: For these issues and the purposes
16 that were discussed today. Thank you.

17 (Proceedings adjourned at 11:30 a.m.)

18 CERTIFICATE OF REPORTER

19 I, Jeffrey B. Kull, Official Reporter, certify that
20 the foregoing is a correct transcript from the record of
21 proceedings in the above-entitled matter.

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23
24 _____/s/_____

25 Jeffrey B. Kull,
Official Federal Reporter

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